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No. 01-1444

IN THE

Supreme Court of the United States

BEN CHAVEZ,
Petitioner,

vs.

OLIVERIO MARTINEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether qualified immunity should be granted as a matter of law where Petitioner's argument depends upon facts that are not in the record or facts rejected by the lower courts.

2. Whether Petitioner is entitled to qualified immunity when engaged in a knowing violation of Respondent's constitutional rights by interrogating a physically and mentally incapable suspect with psychologically coercive techniques, after Respondent invoked his right to remain silent, until he had obtained a coerced statement.

3. Whether the fact that Respondent's coerced statement was not introduced in a criminal trial excuses Petitioner's deliberate violation of Respondent's constitutional rights.

4. Whether it is sufficient that Respondent demonstrated that Petitioner acted with "deliberate indifference" to his constitutional rights in order to maintain his constitutional claim.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

A. The Shooting of Oliverio Martinez 1

B. The Coercive Interrogation 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

STANDARD OF REVIEW: QUALIFIED IMMUNITY 10

QUALIFIED IMMUNITY FOR FIFTH AND FOURTEENTH AMENDMENT VIOLATIONS BY OFFICER PETITIONER SHOULD BE DENIED .. 12

A. Petitioner's Conduct Violated Clearly Established Fifth Amendment Rights 12

1. Self-Incrimination and Due Process Rights Are Not Limited to When a Statement Is Introduced at a Criminal Trial 15

Page

2. Seminal Cases Have Rejected Chavez's Contention 18

3. The Text of the Fifth Amendment Is Incompatible with Petitioner's Narrow View 22

4. Lower Courts Have Rejected Petitioner's Contention 25

5. The "Coercion" Contemplated by Kastigar Immunity Does Not Support Petitioner's Contention 27

B. The Facts Show that Chavez Also Violated Martinez's Due Process Rights to Be Free from Arbitrary Police Conduct 29

1. Chavez Violated Due Process at the Time He Coerced an Incriminating Statement 29

2. It is Clearly Established that Due Process Protects Against an Intentional Violation or Deliberate Indifference to the Right to Be Free from Coercive Interrogations 33

Page

3. Chavez's Indifference to Martinez's Condition Combined with His Intentional Violations of Clearly Established Constitutional Rights Violates Due Process 33

4. There Are Solid Policy Reasons Why the Narrow Reading of the Fifth and Fourteenth Amendments Should Be Rejected 37

5. Chavez's Misconduct Is a Violation of the Liberties That the Fifth and Fourteenth Amendments Are Intended to Prevent 40

C. Chavez Could Not Have Reasonably Believed That His Conduct Did Not Violate a Clearly Established Constitutional Right Because He Acted Unreasonably under the Circumstances 43

1. Chavez's Mistake of What the Law Required in the Situation He Faced Was Unreasonable 43

Page

2. Under The Law No Reasonable Officer Could Have Believed the Interrogation Was Lawful 45

D. Section 1983 Claims for Constitutional Violations of the Fifth and Fourteenth Amendments are Actionable 46

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 48

Blackburn v. Alabama,
361 U.S. 199 (1960) 33, 41

Boyd v. United States,
116 U.S. 616 (1886) 13, 15

Bram v. United States,
168 U.S. 532 (1897) 13

California Attorneys for Criminal Justice v. Butts,
195 F.3d 1039 (9th Cir.1999) 25, 33

Clanton v. Cooper,
129 F.3d 1147 (10th Cir. 1997) 26

Cleveland v. Policy Management Systems Corp.,
119 S.Ct. 1597 (1999) 37

Colorado v. Connelly,
479 U.S. 157 (1986) 24, 29, 30, 32

Cooper v. Dupnik,
963 F.2d 1220 (9th Cir. 1992) .. 12, 25, 31, 32

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 33, 35-37

Page

Davidson v. Cannon,
474 U.S. 344 (1986) 34

Dickerson v. United States,
530 U.S. 428 (2000) 15, 40, 42

Duckworth v. Eagan,
492 U.S. 195 (1989) 24, 31

Duncan v. Nelson,
466 F.2d 939 (7th Cir. 1972) 32

Elder v. Holloway,
510 U.S. 510 (1994) 12

Escobedo v. Illinois,
378 U.S. 478 (1964) 40

Gardner v. Broderick,
392 U.S. 273 (1968) 20

Garrity v. New Jersey,
385 U.S. 493 (1967) 20

Gray v. Spillman,
925 F.2d 90 (4th Cir. 1991) 26, 32

Harris v. New York,
401 U.S. 222 (1971) 42

Haynes v. State of Washington,
373 U.S. 503 (1963) 19, 42

Page

Kastigar v. United States,
406 U.S. 441 (1972) 27-28

Lefkowitz v. Turley,
414 U.S. 70 (1973) 20

Lewis v. Brautigam,
227 F.2d 124 (5th Cir. 1955) 32

Malloy v. Hogan,
378 U.S. 1 (1964) 19

Michigan v. Tucker,
417 U.S. 433 (1974) 20, 38, 39, 42, 43

Miller v. Fenton,
474 U.S. 104 (1985) 14, 33

Mincey v. Arizona,
437 U.S. 385 (1978) 14, 42

Miranda v. Arizona,
384 U.S. 436 (1966) ..... *passim*

Mitchell v. Forsyth,
472 U.S. 511 (1985) 11, 12

Mitchum v. Foster,
407 U.S. 225 (1972) 46

Monroe v. Pape,
365 U.S. 167 (1961) 46

Page

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) 27

Oregon v. Elstad,
470 U.S. 298 (1985) 41

Oregon v. Hass,
420 U.S. 714 (1975) 42

Quarles v. New York,
467 U.S. 649 (1984) 41

Saucier v. Katz,
533 U.S. 194 (2001) 10, 11, 44, 48

Spano v. New York,
360 U.S. 315 (1959) 18, 42

Spevack v. Klein,
385 U.S. 511 (1967) 20

Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968) 20

United States v. Balsys,
524 U.S. 666 (1998) 22

United States v. Hubbell,
530 U.S. 27 (2000) 21, 25

Page

United States v. North,
920 F.2d 940 (D.C. Cir. 1990) 26

United States v. Verdugo Urquidez,
494 U.S. 259 (1990) 16

Weaver v. Brenner,
40 F.3d 527 (2nd Cir. 1994) 26, 32

Williams v. United States,
342 U.S. 97 (1951) 32

Wilkins v. May,
872 F.2d 190 (7th Cir. 1989) 32

Wilson v. Garcia, 471 U.S. 261 (1985) 47

Wilson v. Lawrence County,
260 F.3d 946 (8th Cir. 2001) 27, 32

Statutes

18 U.S.C. § 6003 (a) 21
28 U.S.C. § 1291 11
42 U.S.C. § 1983 ... 9, 11, 25, 26, 39, 42, 43, 46, 47

Constitution

United States Constitution
Fifth Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

Page

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STATEMENT OF THE CASE

A. The Shooting of Oliverio Martinez

At approximately 7:00 p.m., on November 28, 1997, Officers Maria Peña and Andrew Salinas were investigating suspected narcotic activity at a shed near a vacant field located behind a residential area in a rural section of Oxnard, California. C.A.[1] 46:1-18; 47:3-16. They were questioning Eluterio Flores, a local farm field worker, (C.A.254:13-16; 255:5-8) but found no violation of any criminal law, (C.A.51:2-24; 52:1-20), nor any drugs, nor drug related materials in the shed or on Flores. C.A. 52:5-11; 60:12-17.

Oliverio Martinez, also a farm field worker, was heading home on his bicycle through a frequently used short cut. C.A. 79:20-25 to C.A. 80:1-13. As Martinez bicycled near the shed, Salinas heard his squeaky bike and yelled at him to stop. C.A. 206:19-22.

Peña and Salinas agree that Martinez was cooperative. He obeyed their command and parked his bike, put the kickstand down, and never spoke ill to Salinas, (C.A. 63:7-19), he just stood right by his bicycle. C.A. 64:3-8. He obeyed when the officer told him to place his hands behind his head. C.A. 57:17-20; 63:7-25 to C.A. 64:1-8; C.A. 79:10-16; 82:14-24. Salinas had no information that Martinez was involved in criminal activity or under the influence of drugs. C.A.71:18-21.

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[1] "C.A." refers to the "Court of Appeal Record," and "J.A." refers to "Joint Appendix."

While Salinas was searching Martinez, he felt a field knife and without warning he tackled him and threw him to the ground, falling on top of Martinez. C.A. 83:17-23. Martinez carried his work knife in a leather sheath which was used to cut strawberries, on the right side of his waist. C.A. 78:15-25. When Salinas was patting him down he did not see the knife. C.A. 62:2-6. Martinez had complied with every request and had not resisted. C.A. 63:1-6; 64:1-11. At no time did Martinez attempt to touch or to take his work knife out of his clothing. C.A. 66:9-11. Salinas first saw the knife after Martinez was shot and handcuffed with his hands behind his back. C.A. 62:7-13; 62:20-23. Martinez never made any aggressive or threatening movements toward the officers. C.A. 75:24-25; 76:1-25; 77:12-13; 58:13-16; and 59:20-25.

Officer Peña saw Martinez and Salinas fall to the ground and ran over to them. When she got there, Martinez was on all fours trying to get up, and Salinas was on his side. She attempted to get control of Martinez, but all three "kept falling and trying to get up again." (It is a rocky, grassy field.) C.A. 180:16-25. Peña observed that Martinez was not trying to cause injury to Salinas, nor "trying to fight meaning cause injury to officer Salinas." C.A. 190:14-17. She has no idea why "they were struggling," and when she tried to get a hold of Martinez, they all just kept falling." C.A. 180:16-25. Officer Peña pulled the work knife, still in the sheath, out of Martinez's waistband and threw it behind her. C.A. 181:3-5.

After the incident, Officers Peña and Salinas alleged that Martinez took Salina's holstered gun away from Salinas, and was pointing the gun at them. However,

Salinas testified that he never saw Martinez reach for his gun and take it out of his holster; that he never felt Martinez pull the gun out of his holster, (C.A. 69:13-18); and Salinas never saw Martinez point the gun at Peña. C.A. 49:1-7 ; C.A. 65: 23-25; 66:1; 68: 1-25; 69: 13-25; 70:1-2. Chavez testified in his deposition that "Salinas told him that Mr. Oliverio *tried* to take his gun and that Peña shot him." C.A. 102:21-22. Flores observed these events and testified that Martinez did not touch the gun or take the gun out of Salinas' holster and he never held it. C.A. 93:22-24; 94:1-25; 95:1-2. Martinez denies that he ever touched the gun or took the gun out of Salinas' holster or that he ever held it. C.A. 84: 4-10; 85: 16-18.

Salinas said that he shouted to Peña, "he's got a big f--- knife," (C.A. 204:16-17) but Peña testified that she did not hear this. Peña never saw Martinez strike Salinas and he never struck her. (C.A. 67:8-20.) Peña shot Martinez numerous times: one bullet entering the left side of Martinez's head, traversing behind both eyes and exiting the right eye orbit causing immediate blindness, the second bullet fractured the 12th rib and fractured the vertebra mid-back causing immediate paralysis, and several other bullets hit his right knee as he lay on the ground critically wounded. C.A. 16-18; 23:15-18; and 24:13-15.

B. The Coercive Interrogation

Petitioner Chavez had been on the force 16 years. (C.A. 98:20-25), and was one of the first officers to arrive at the scene of the shooting. C.A. 100:18-25; 101:1-10. Upon arriving he first met with officers Peña and Salinas. C.A. 100:7-9. When Chavez saw Salinas at

the scene, Salinas pulled the gun from the holster and removed it. C.A. 105:3-10. Chavez said it had blood, (C.A. 105:14-16), but there is no forensic evidence of Martinez's blood or his fingerprints on the gun. Chavez saw that Martinez was in police custody, there were no risks that he would escape, and he was "lying on his back and handcuffed." C.A.104:12-17. Chavez, Salinas, and Peña met and discussed the shooting and the story that Martinez had taken his gun away and was going to shoot them with it. C.A. 102:17-25; 103:1-25; 104:1-3 and 18-25; 105:1-2; 113: 6-10; 116:13-25; and 117:1-7.

Chavez's purpose for conducting an investigation was to *"find out first off if the crime had been committed";* and "to find the truth" and *"nothing else* that he could think of." C.A. 98:5-25 and 99:1-7, emphasis added. Chavez knew that Martinez was a "suspect," for the alleged crime of "attempting to kill a police officer." C.A. 368 ¶20. Chavez began to set up a crime scene perimeter, putting up yellow perimeter tape and clearing the crime scene of people. He instructed an officer to begin a crime scene log. C.A. 39 ¶3. Chavez testified that as Martinez laid in the field he "appeared to be injured." He "was shot in the head," and "both his eyes were swollen shut and he had blood coming from the side of his head." C.A. 107:19-20. Chavez heard Martinez saying that "he was hurting" and he heard him "definitely screaming" in pain, (C.A. 104:12-14; 106:19-25; and 107:4-20) and complaining of pain to the bottom portion of his body. C.A. 109:5-7. Chavez's assessment was that "he was not doing so good." C.A. 114: 9.

Chavez accompanied Martinez in the ambulance to the hospital in order to "obtain a statement from

Martinez." It was his purpose to "attempt to get a statement from him" and he was "still conducting this crime investigation." Chavez testified that he knew that Martinez was a "suspect," for the alleged "crime of attempting to kill a police officer." C.A. 368 ¶20. In the ambulance, Martinez was crying in pain and Chavez tried to get a statement but Martinez did not give a statement. Chavez continued to try to get information. C.A. 39, ¶ 5. Chavez knew the paramedics gave Martinez medication for his pain in the ambulance. C.A. 110:25 to 111:1-4. Chavez testified that he knew Martinez was not doing so good, and this meant to Chavez "that maybe *Martinez's mental capacities were not focused on giving a statement* regarding what had occurred." C.A. 114:9-18 and 374 ¶29, emphasis added. Chavez never gave him any Miranda warnings. C.A.113:17-21.

During the interrogation, Chavez knew Martinez was "in and out of consciousness." C.A. 40. Chavez testified and reported to his department that "the suspect [Martinez] continued not to give any statements until after he was given some type of medication in the emergency room," and that "*[a]fter being medicated,* Chavez approached the suspect and continued interrogating him." C.A. 110:4-21; 113:17-24; C.A. 40, emphasis added. "There were times in the emergency room when medical personnel would push me [Chavez] out of the room so they could work with Martinez." C.A. 115:10-12 & 240:10-12.

Chavez resumed the questioning but Martinez could not state his name nor remember his birth date. J.A. 7 & 8; C.A. 21. On the audiotape Martinez repeatedly answers, "I don't know what happened? (sic)" and even

when he cried in pain, "*Ay!* I am dying. *Ay!* What are they doing to me?" or moaned "I am choking," - Chavez continued, "Tell me, what happened." J.A.9; C.A 22.

Chavez testified that when the tape recorder was turned off it was because he was pushed out of the emergency room by the physicians. When he turned it back on Martinez's moans, "I am choking," and Chavez reinforces his fear of dying: "Can you hear? ... *If you are going to die*, tell me what happened . . . (sic)." J.A. 10; C.A. 23-24, emphasis added. Chavez continued: "OK, *yes you are dying*," Chavez then first suggests to Martinez that he grabbed the gun: "... did you get his gun? Did you grab the gun of the other policeman?" Martinez answers "Yes." J.A. 11; C.A. 24. Chavez pursues, "Did you want to kill the police or what? "Did you want to shoot the police? ... the gun was not pointed to the police. (Sic)." When Martinez answers "no" and pleads, "Doctor, please I want air, I am dying," at this moment, Chavez again asks if Martinez pointed the gun at the officer. This time Martinez changes his prior "no" answer to a "yes." J.A. 12; C.A. 25. C.A. 87: 25 to 88:1-22 and 89:1-10.[2] The District Court found that it could not imagine what Chavez or any officer could do to cause more pain. It found Chavez had knowledge of Martinez's state of pain, disability, his medicated condition, and his request for treatment. Chavez's coercive questioning after Martinez's repeated invocation of the privilege and Chavez's failure to give *Miranda*, are described, as a matter of law, to be a clear violation of constitutional rights. Pet. App. 21a.

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[2] The Court should take notice of the grammatically confusing questions throughout the transcription.

On nine (9) occasions Chavez reinforced Martinez's fear of dying by either asking or affirming that he was going to die.[3] The District Court found that Martinez was susceptible to coercion and that Chavez reinforcement of this fear of dying was psychologically coercive. Pet. App. 28a. It also found the totality of the circumstances revealed that Martinez did not want to talk and the questioning persisted. Pet. App. 22a.

Chavez admitted in his declaration that he is "well aware of the *Miranda* decision and of the importance of a citizen's right against self-incrimination." C.A. 451 ¶5. He also admits that he had education from the academy and training in college that a suspect's statement should be voluntary and he should stop questioning when a suspect says he doesn't want to talk. C.A. 111:14-25; 112:1-15.

The District Court found that Chavez's 45 minute interrogation was "excessively lengthy" in light of the fact that plaintiff was suffering excruciating pain and being prepared for emergency surgery and Chavez's interjection into the emergency room "exacerbates the coercive nature of the interview." Pet. App. 27a-28a.

Martinez had not committed a crime and was never charged with a crime for his alleged attempt to murder two police officers, nor with any crime at all. Contrary to Martinez's coerced statement, hospital records do not

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[3] "*Sir, if you are going to die .....* Huh? Sir, sir? And despite Martinez's repeated request for treatment, (J.A. 13-14; C.A. 26-27), and screams "Uuuggghhh! My belly hurts," Chavez persisted, "Sir, you are going to die . . . " ignoring Martinez's plea, "I want to be treated. Please." J.A. 13-22; C.A. 26-33.

reveal use of heroin or alcohol. The evidence is void of any forensic evidence of the gun having Martinez's fingerprints, nor of Martinez's blood on the gun. C.A. 377 ¶34. The record is void of any statement by Chavez that he was investigating "police misconduct" at any time.

The District Court found that at "the time Chavez was interviewing plaintiff, he had no knowledge of whether or not a prosecutor would charge plaintiff if he survived. Moreover, the Court has no statement from Chavez that he did not believe plaintiff would ever be charged." The Court found Chavez's argument "speculative hindsight," (Pet. App. 29a) and concluded that no reasonable officer would believe that an interrogation of an individual "receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain" was constitutionally permissible and denied qualified immunity. Id.

SUMMARY OF ARGUMENT

Petitioner's interrogation of Respondent violated values at the core of constitutional constraints on abusive government conduct. Respondent, an innocent passerby, was attacked without warning by one officer and then shot multiple times by another officer, resulting in instant blindness and paralysis. While helpless and in excruciating pain, Petitioner subjected him to an exceptionally coercive interrogation until he broke Respondent's will and obtained an incriminating statement. Respondent was never charged with a crime because there was no evidence he had committed a crime.

Respondent filed an action pursuant to 42 U.S.C. § 1983 contending that the shooting and the subsequent coercive interrogation violated his constitutional rights. After discovery, the District Court granted Respondent's motion for summary judgment against Petitioner based primarily upon Petitioner's statements, deposition testimony and the audiotape of the interrogation in the emergency room of the hospital. The District Court found that Petitioner had violated Respondent's clearly established rights under the Fifth and Fourteenth Amendments and he was not entitled to qualified immunity because any reasonable officer would have known that this conduct violated the Constitution.

Petitioner took an interlocutory appeal solely on the issue of qualified immunity. The Ninth Circuit affirmed the District Court's order denying Petitioner qualified immunity.

Petitioner asks this Court to adopt a radical interpretation of the Fifth and Fourteenth Amendments and our civil rights laws which would eviscerate long established constitutional protections against coercive interrogation. He asks that the self-incrimination and due process clauses be limited solely to exclusionary rules applicable only in a criminal trial.

ARGUMENT

STANDARD OF REVIEW: QUALIFIED IMMUNITY

The determination by the District Court of whether a police officer is entitled to qualified immunity is based on two questions: First, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, (2001). If the answer to the first question is "no," then the case against the officer is dismissed because there is no constitutional violation. Id. If the answer is "yes," the second question is whether the officer could nevertheless have reasonably, but mistakenly believed that his or her conduct did not violate a clearly established constitutional right, because the officers acted reasonably under the circumstances. Therefore, the officers are entitled to qualified immunity. Id.

Here, Petitioner's brief, in large part, ignores the standard for review and urges facts that were specifically rejected by the District Court or that have no factual basis in the record. (See e.g., Pet Brief 35, "Chavez had every legitimate interest in investigating whether there had been police misconduct in the shooting of Martinez.") The record contains no evidence that Petitioner was conducting an investigation into police misconduct. In deposition he said the purpose of his investigation was to: "find out first off if the crime had been committed"; and "to find the truth" and "nothing else that I can think of." C.A. 98:5-25 and 99:1-7. Moreover, when asked in deposition if he had ever conducted an investigation of an officer involved shooting, he admitted he had not and that was the

province of detectives. C.A. 232: 21-25.

Petitioner's "Question Presented" asserts that Chavez's purpose was benign: "the officer's undisputed purpose was to obtain evidence from an individual, shot by the police, before that individual's anticipated imminent death." (See Pet. Brief.) This assertion was rejected by the District Court as "speculative hindsight." Pet. App. 29a. The District Court's determinations should not be overturned as this Court must assume the nonmoving party's version of the facts to be taken in the light most favorable to the party asserting the injury. *Saucier,* supra, 533 U.S. at 201. [4] The portion of the District Court's order (Pet. App. 19a - 23a) finding that Petitioner purposefully violated Respondent's rights were not questions upon which *certiorari* was granted by this Court and those facts should not be overturned. Nor was *certiorari* granted for review of the District Court's determination that Petitioner violated the Fourteenth Amendment. Petitioner raised only a Fifth Amendment issue in the Petition. The jurisdiction of an interlocutory appeal would be lost when, as here, the Petitioner seeks to have this Court review a denial of qualified immunity based on the defendant's allegations. Respondent requests the Court not adopt Petitioner's proffered argument.

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[4] The review of a District Court's denial of qualified immunity in a 42 U.S.C. § 1983 action is based upon a narrow exception to 28 U.S.C. § 1291. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). (Interlocutory appeals are limited to issues of law based on the facts as alleged by the plaintiff or found to be undisputed by the trial court.) Id., 527.

QUALIFIED IMMUNITY FOR FIFTH AND FOURTEENTH AMENDMENT VIOLATIONS BY OFFICER PETITIONER SHOULD BE DENIED

A. Petitioner's Conduct Violated Clearly Established Fifth Amendment Rights

Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts."[5] A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." *Elder v. Holloway,* 510 U.S. 510, 518 (1994)

The following sections demonstrate that the law violated by Petitioner was clearly established by: (1) the long history of this Court's relevant precedent, and (2) a series of appellate decisions holding that the Fifth Amendment privilege against self-incrimination applies in custodial settings, civil litigation, administrative and legislative proceedings, before grand juries, as well as in criminal courtroom.

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (*en banc*) clearly established before the events in this case that conduct of the kind Petitioner engaged in violated the Fifth and Fourteenth Amendments. Indeed, Martinez's mental and physical incapacity at the time of his interrogation makes this an *a fortiori* case.

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[5] See *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985).

Moreover, *Cooper v. Dupnik* is grounded in the decisions of this Court going back for more than a century that clearly established the self-incrimination privilege and due process protections.

In *Boyd v. United States,* 116 U.S. 616 (1886) this Court stated that "any forcible and compulsory extortion of a man's own testimony . . . to be used as evidence to convict him of crime or to forfeit his goods . . ." is within the condemnation of the Fifth Amendment. Id. A year later in *Bram v. United States,* 168 U.S. 532 (1897) this Court held that the privilege against self-incrimination was a basic concept of liberty in a free society. "[A]ny compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government." Id., 631-632.[6]

The constitutional right against self-incrimination was crystalized in no uncertain terms in *Miranda v. Arizona,* 384 U.S. 436 (1966). In pronouncing what is now an essential aspect of established law and the culture of the United States, taught to Chavez and to every rookie police cadet and in every citizenship class and junior high school civics curriculum, this Court made clear the admonitions were embedded in the Fifth Amendment as constitutional rights. The Court forcefully held that the Constitutional prohibition against self-incrimination is "fully applicable during a period of custodial interrogation." Id., 460-461.

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[6] *Bram* held that under the self-incrimination clause the constitutional issue is "whether the confession was 'free and voluntary': that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." Id., 542-543.

Following *Miranda,* in 1978, this Court again illuminated the due process protections of the Constitution against coercive police interrogation in *Mincey v. Arizona,* 437 U.S. 385 (1978). The District Court described the circumstances under which Mincy's statement was coerced and analogized it to the present case. "He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation." (Id. at 398, footnote omitted). This Court concluded: "It is hard to imagine a situation less conducive to the exercise of a 'rational intellect and a free will.'" Id. In *Mincey* as here, the confession "was not product of a free and rational will." *Miller v. Fenton,* 474 U.S. 104, 110 (1985).[7]

The Ninth Circuit found that "[t]o the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey,* it is more egregious." Pet. App. 13a. Chavez's conduct falls within the aggravated conditions as discussed in the dissent in *Mincey*.[8] The incapacitated suspect's right to be free from coercive interrogation in a hospital setting was clearly established twenty years ago by this Court's relevant precedent in *Mincey.*

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[7] See Pet. App. 21a - 22a: "He had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details for the encounter with the police. The questioning persisted in spite of plaintiff's request for medical treatment and unequivocal statements that he did not want to talk."

[8] The dissent in *Mincey*, would consider conditions such as consciousness, whether medication was administered, a contradictory statement that there was coercion, etc., elements which appear in the case at bench.

The traditional constitutional protections of the privilege established in *Boyd* in 1897, reaffirmed in1966 in *Miranda,* and again in 1978 in *Mincey* were recently reaffirmed as constitutionally based limits on police interrogations in *Dickerson v. United States,* 530 U.S. 428 (2000). *Dickerson* confirmed the continued vitality of the constitutional rule that *Miranda* announced in setting limits on coercion in pretrial settings: . . . custodial police interrogation . . . exacts a heavy toll on individual liberty and trades on the weakness of individuals." Id., 434-435, footnote omitted.

These relevant precedents and those following show that the rights Chavez violated were clearly established.

1. Self-Incrimination and Due Process Rights Are Not Limited to When a Statement Is Introduced at a Criminal Trial

Chavez and the amici argue that the Fifth Amendment and the Fourteenth Amendments are only trial rights limited to the prophylactic remedy of exclusion in a criminal trial. Chavez's radical reinterpretation of the Fifth Amendment would permit officers to engage in the most egregious and abusive conduct in violations of decades of Fifth Amendment jurisprudence without remedy as long as the coerced statement is not introduced at a trial. There is no basis for such a rule other than to provide an unjustified immunity for patently unconstitutional conduct to police officers. This argument completely ignores fundamental aspect of the privilege against self-incrimination which extends the constitutional protections to a multitude of situations far

beyond the criminal "trial" exclusionary rule.

Chavez and the amici attempt to support their theory by relying: first, on a comment regarding the Fifth Amendment as a "trial right" based primarily on a comment in *United States v. Verdugo Urquidez*, 494 U.S. 259 (1990) and second, rewriting the text of the Fifth Amendment to read ". . . no person . . . shall be compelled in a criminal *trial* to be a witness against himself, unless and until the statement is introduced into evidence."

First, the comment regarding the Fifth Amendment in *Verdugo Urquidez* was dicta. [9] There, this Court held that the Fourth Amendment did not extend to a search in Mexico and provided no protection to the rights of an alien who is a citizen and resident of Mexico with no voluntary attachment to the United States. Id., 274-275. More important, the decision did not expressly overrule the numerous opinions of this Court and lower courts that expressly do not limit the protections of the Fifth Amendment to an exclusionary rule in a criminal trial. (See discussion of *Verdugo-Urquidez* in Opp. Cert., 14 - 17.)

Second, the text of the Fifth Amendment does not read as Chavez wishes and a contextual analysis of the privilege and the due process clause (see section A. 3.

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[9] "Dicta" is defined as: "(1) Opinions of a judge which do not embody the resolution or determinations of the court. (2) Expressions in a court's opinion which go beyond the facts before the court and are therefore individual views of the author of the opinion and not binding in subsequent cases." Black's Law Dictionary, West Pub., 5th Ed. p. 408.

below) in conjunction with this Court's decisions (see sections A. 2. and A. 4. and B below) demonstrate that these constitutional protections are not relegated solely to an exclusionary rule in a criminal trial.

Based on his faulty reasoning, Chavez concludes that Martinez, or any person in the United States, whether guilty or innocent (the evidence shows Martinez was innocent the evening of the shooting), whether accused of a crime or not, may be subject to all of the evils of intentional psychological unbearable coercion and deprivation of human dignity and not have a remedy for the intentional violation of that right itself. This is not the law, nor should it be. Nor is this the history of the privilege against self-incrimination and the protections of the due process clause as is demonstrated by the preceding and following cases of this Court. The America suggested by Chavez's theory is one in which most Americans would not want to live and one which most Americans would not tolerate. One in which local and federal police could, with impunity, hold persons and subject them to torture and, if a case is not prosecuted or if a coerced statement is not introduced into a criminal trial, there is no remedy for violation of an express constitutional provision in the Bill of Rights, protecting one of the core tenets of our Constitution.

One of the most obvious results would be that officers who deliberately ignore *Miranda* and resort to tactics that have been condemned by this Court, would be embolden to purposely disregard fundamental constitutional law. Not only would this dramatic change in the law nullify the efforts of this Court to establish "concrete constitutional guidelines for law enforcement agencies and courts to follow," (*Miranda,* 435), it would

create, for most Americans, distrust for law enforcement. This result – the practice of intentionally questioning an in-custody criminal suspect in violation of *Miranda* and the Fifth and Fourteenth Amendments – is a very real threat to civil liberties amply documented by Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich L.R., 1121 (2001). Weisselberg's article documents that law enforcement agencies in California are training officers to consider violating *Miranda.*[10]

2. Seminal Cases Have Rejected Chavez's Contention

In *Spano v. New York*, 360 U.S. 315 (1959) the Court demonstrated that the dictates of the due process clause control the legality of the actions by police during interrogations, and its reach is not limited to criminal trials:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which

[10] Documenting police training throughout California condoning intentional violation of *Miranda*. See also Charles D. Weisselberg, *Saving Miranda,* 84 Cornell L. Rev. 109 (1998).

> they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. Id., 320-321.

In *Haynes v. State of Washington*, 373 U.S. 503 (1963) the Court explicitly declared that the methods of the police that were employed to coerce a written confession were themselves "constitutionally impermissible" Id., 519.

In *Malloy v. Hogan*, 378 U.S. 1 (1964),[11] Malloy never gave a statement and therefore none was ever introduced into a criminal trial. There, this court rejected Chavez's principle argument here. Stating that the decisions of the Court, particularly those involving coerced confessions had become "a fundamental part of the fabric of our society," (Id., 9-10) and that an accused is privileged against incriminating himself " . . . either in the jail house, the grand jury room, or on the witness stand in a public trial. . . ." Id., footnote 8.

In 1966 the *Miranda* Court addressed "The question in these cases is whether th. ivilege is fully applicable during a period of custodial interrogation." *Miranda,* 460-461. The Court made absolutely clear that it was:

> Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal*

[11] Malloy was ordered to testify in an inquiry into alleged gambling activities. His asserted the privilege was held in contempt and imprisoned. This Court held the privilege against self-incrimination was applicable to the state court.

court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. Id. at 467, emphasis added.

A year after *Miranda,* in *Spevack v. Klein*, 385 U.S. 511 (1967), an attorney was disbarred for failing to waive his privilege against self-incrimination at a judicial inquiry into professional misconduct. Although there was no statement that was used in a criminal trial, the Court ordered reinstatement for the constitutional violation. Following *Spevack*, a year later in *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968), public workers called before the grand jury were fired for refusing to testify against themselves or waive immunity. This Court found their Fifth Amendment rights had been violated and ordered reinstatement for the fired employees. The workers never made any statement, nor was there a criminal trial. In *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) the Court held unconstitutional a state statute which would have compelled architects to testify over an assertion of Fifth Amendment rights, by denying them government contracts unless they waived any claim of immunity from prosecution based upon their answers. Again, no incriminating statement was introduced into a criminal trial. In the context of an administratively compelled statement involving police officers, the violation of the Fifth Amendment occurs if the officer is forced to give a statement at the threat of losing his/her job when the same statement can also be used for criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *Gardner v. Broderick*, 392 U.S. 273 (1968). In *Michigan v. Tucker,* 417 U.S. 433 (1974) this

Court, in an opinion written by Chief Justice Rehnquist again specifically rejected the narrow formulation urged by Chavez:

> Where there has been genuine compulsion of testimony, the right has been given broad scope. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock, supra;* to civil proceedings, *McCarthy v. Arndstein, 266 U.S. 34 (1924);* to congressional investigations, *Watkins v. United States, 354 U.S. 178 (1957);* to juvenile proceedings, *In re Gault, 387 U.S. 1 (1967);* and to other statutory inquiries, *Malloy v. Hogan, 378 U.S. 1 (1964).* (Id., 440, emphasis added.)

Just two years ago this Court directly rejected the narrow interpretation of the Fifth Amendment's self-incrimination privilege in *United States v. Hubbell,* 530 U.S. 27 (2000). [12] In discussion the government's contention that the evidence was not introduced into evidence, the Court stated:

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[12] There Court upheld the dismissal of the government's prosecution of Hubbell after he produced documents in response to a court order issued pursuant to 18 U.S.C. § 6003 (a). The order granted him immunity and the Court held that Hubbell could not be compelled to produce the documents without first receiving a grant of immunity under the statute because such immunity was co-extensive with the constitutional privilege.

Finally, the phrase "in any criminal case" in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Id., 37-38, citing *Hoffman v. United States*, 341 U.S. 479, 486, (1951).

3. The Text of the Fifth Amendment Is Incompatible with Petitioner's Narrow View

Petitioner's argument that a due process violation can occur only at "trial" is sophism. Justice Souter pointed out in *United States v. Balsys* 524 U.S. 666, 673 (1998), that "the cardinal rule [is] to construe provisions in context."

The Fifth Amendment has four distinct clauses (separated by a semi-colon), with the third clause reading, "*nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .*" Grammatically the clause "without due process of law" is the main clause (separated by a comma) to both antecedent subordinate clauses united by the conjunction "nor" and thus are of equal structural rank. The subordinate elements are grammatically dependent on the sentence base "*without due process of law,*" establishing its (the base or principal idea) connection to the subordinate clauses "nor shall be compelled . . . against himself" and "nor be deprived of life, liberty

. . ." and draw attention to the principal idea "*without due process of law.*" [13] Thus, the Fifth Amendment contains its very own mandate that "without due process of law" "no person in a criminal case shall be a witness against himself *nor deprived of life, liberty*, or property." (Emphasis added.)

The Framers did not use the word "criminal *trial*" (limiting the scope only to "trial procedures") but instead selected the broader concept of "criminal *case.*" The word "case" has been defined by this Court to encompass the entire criminal process, including police interrogations (as subsequently held in *Miranda*).

The word "case," which the Oxford Dictionary indicates dates back to 1523, is defined in part as "a case as presented or put to the Court by one of the parties in a suit; hence, the sum of the grounds on which he rests his claim." Black's Law Dictionary, 5th Edition, defines the word "case" as "A general term for an action, cause, suit or controversy, at law . . . a question contested before a court of justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice . . . a Criminal act requiring investigation by police. . . . In ordinary usage, the word "case" means "event," "happening," "situation," "circumstance."

By contrast, "trial" is defined by the Oxford Dictionary (and dated back to 1577) as "the examination and determination of a cause by a judicial tribunal."

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[13] *Hodges' Harbrace College Handbook*, Twelve Edition, Horner, Webb, Miller. 1994, pg.241.

Black's Law Dictionary, 5th Edition, defines it as "a judicial examination and determination of issues between parties to action . . . whether they be issues of law or fact. A judicial examination, in accordance with law . . ."

Webster's New World Dictionary, 3rd Ed., defines "trial' as "the act or process of trying, testing, or putting to the proof . . . ." "Judicial" of course meaning "belonging to the office of a judge" - the trial.

It would be illogical that our Framers concerned with torture chambers, would have intended the Fifth Amendment to apply only to "trials" and not to the entire criminal "case" or process. It follows, and this Court has already held, that the police criminal interrogation process falls within the application of the "due process clause." In *Colorado v. Connelly*, this Court held that the "coercive police activity" is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause. Id., 167,

Another clear interpretation that the "criminal process" is not just a "trial" is found in *Duckworth v. Eagan* 492 U.S. 195 (1989). This Court clarified that "a violation of the constitutional right occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process." Id., 209, citing *Colorado v. Connelly*. Had the Court intended this "right" to be violated only at "trial," and if so, no violation occurs, it would not have used the words "criminal process" nor would the Court have held that "police activity is a necessary predicate" to a violation of

due process by coercive interrogation in the above holdings. Thus, the word "case" within the context of the Fifth Amendment, by its plain meaning and by this Court's precedent, includes the "criminal process" and encompasses the predicate action or "interrogation by police" as part of the "criminal case."

Consistent with this contextual analysis is *United States v. Hubbell,* discussed above, which explained that the phrase "in any criminal case" encompasses pre-trial compelled statements that lead to incriminating evidence.

4. Lower Courts Have Rejected Petitioner's Contention

The thrust of Chavez's argument is to repeatedly attack the Ninth Circuit and the holding of *Cooper v. Dupnik,* [14] as being the sole authority that has held that a purposeful violation of the self-incrimination privilege and due process is actionable regardless of whether the statement is admitted into a criminal trial. [15] In fact, numerous courts of appeal have held that the Fifth Amendment is violated at the time of the coercion and

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[14] Upholding § 1983 claim and denying qualified immunity for violation of Fifth Amendment rights where police had purposely coerced incriminating statements while in custody, although no use at trial. "The Task Force's wrongdoing was complete at the moment it forced Cooper to speak." Id., 1242-1244

[15] See also *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir.1999) *en banc* court found that intentional questioning after invocation of the privilege constitutes a violation although statements not introduced into criminal trial.

that the coerced statement need not be introduced at the individual's criminal trial before the Amendment is violated.

For example over 12 years ago the D.C. Circuit stated that Iran-Contra co-conspirator Oliver North's Fifth Amendment rights were violated at the time the statement was taken. *United States v. North,* 920 F.2d 940 (D.C. Cir. 1990). The court held that introducing evidence based on immunized testimony to the grand jury would itself violate constitutional rights and distinguished cases in which a statement is taken in violation of a person's constitutional rights and later introduced in evidence.

A year later in *Gray v. Spillman,* 925 F.2d 90 (4th Cir. 1991) the Fourth Circuit upheld a § 1983 claim for violation of the Fifth and Fourteenth Amendments based upon officers' use of threats, intimidation and force in an attempt to coerce an incriminating statement that the suspect finally made, but that was never introduced into a criminal trial. (*Id.*, 91.) The Second Circuit in *Weaver v. Brenner,* 40 F.3d 527 (2nd Cir. 1994), rejected the use-at-trial contention where the statement that was purposely taken in violation of *Miranda* and coerced but was not introduced in a criminal trial. [16] Similarly, the Tenth Circuit in *Clanton v. Cooper,* 129 F.3d 1147 (10th Cir. 1997) upheld a § 1983 claim and denied qualified immunity for the defendant who coerced a witness in violation of his Fifth Amendment rights (Id., 1158)

[16] "... it is well-settled that for these purposes the criminal case begins with custodial interrogation." (Id., 435, citing *Miranda, Michigan v. Tucker,* and *Lefkowitz v. Turley,* quotes omitted).

although the statement was never introduced into her criminal case. The Eighth Circuit recently in *Wilson v. Lawrence County,* 260 F.3d 946 (8th Cir. 2001) denied qualified immunity where violations of plaintiff's Fifth and Fourteenth Amendment rights were based upon defendants' use of psychologically overbearing interrogation to coerced a murder confession from a mentally retarded man. Id., 952.[17]

This Court's holdings have developed the broad range of circumstances where the Fifth Amendment privilege protects against compulsory self-incrimination. It extends to any governmental proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. As in *Miranda*, this Court has consistently recognized that to fulfill its purposes the constitutional privilege against self-incrimination has two primarily interrelated facets: (1) the government may not use compulsion to elicit self-incriminating statements; and, (2) the Government may not permit the use of self-incriminating statements elicited by compulsion. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 57 fn. 6 (1964).

5. The "Coercion" Contemplated by *Kastigar* Immunity Does Not Support Petitioner's Contention

Petitioner argues that the holding in *Kastigar v.*

[17] The confession was never introduced into evidence as the plaintiff entered a plea before the trial to avoid the death penalty. An independent investigation resulted in a pardon and plaintiff was released after nine years in prison. (Id.)

United States, 406 U.S. 441 (1972) where a witness was compelled to testify before a grand jury under a grant of use immunity should be interpreted as meaning that police "coercion without the use of the statements in a criminal trial does not violate the Fifth Amendment." (See Pet. Bf., 16.) However, Petitioner makes the leap in logic in equating the "coercion" exerted by a grant of immunity over an assertion of the self-incrimination privilege compelling a witness to testify, with the physical and psychological "coercion" that occurs when a suspect is subjected to impermissible interrogation techniques or overbearing of a suspect's will. The similarity in these situations is only in the word "coercion," but the differences are worlds apart.

The fallacy of Chavez's logic is exposed by this hypothetical. A government prosecutor serves a subpoena on a suspect-witness to appear before a grand jury to testify about their knowledge of who committed a crime when a demonstrator, standing behind a group, threw a ripe tomato at a congressman's car while he was visiting Los Angeles. The suspect-witness speaks with a lawyer and asserts his Fifth Amendment privilege. In response, the government applies to the district court for an order directing the witness to answer questions under a grant of immunity. The witness can obtain an attorney, go into district court and oppose the issuance of the order and argue the terms of the immunity. If the court orders the witness to appear and answer questions under the grant of immunity, the witness can still exercise a free will to obey or refuse to appear and face arrest and be held in contempt. The witness still may retain her human dignity and personal integrity and sit in jail. Yes, the choice of immunity and testifying or being held in contempt is coercion, but the process by

which it occurs is one which observes and balances the valid interests of the government against the rights of the suspect. A court of law ensures that the "coercion" is consistent with due process, measured and just, while our laws and human dignity are respected.

However, that type of "coercion" cannot be compared to the "coercion" that occurs if the prosecutor sends out a police squad and they arrest the witness and as Chavez argues: "use brute force and torture to extract an involuntary confession from a suspect." (See (Pet. Brief, 16, fn. 4, arguing that this conduct is not a constitutional violation.) Notwithstanding the difference, the Petitioner concludes that "the officer would not have violated the [Fifth Amendment] privilege because the suspect would not yet have testified against himself at trial." (Pet. Brief, 16, fn. 4.) The Fifth Amendment has traditionally condemned this type of "coercion" and the Petitioner's argument is illogical, unsound and should not be the law.

B. The Facts Show that Chavez Also Violated Martinez's Due Process Rights to Be Free from Arbitrary Police Conduct

1. Chavez Violated Due Process at the Time He Coerced an Incriminating Statement

The Court's opinion in *Colorado v. Connelly,* 479 U.S. 157 (1986) made it absolutely clear that the purpose of the due process clause in reviewing confessions was to prevent abuses by police in pre-trial custodial interrogations. The Court began its opinion pointing out that the due process clause was aimed at "*certain interrogation techniques* . . . are so offensive to a civilized

system of justice that they must be condemned." (Id., 163, emphasis added.) Preventing "*coercive government misconduct* was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*," where police officers extracted confessions through torture. Id. Citing numerous confession cases, the Court emphasized that since *Brown* v. *Mississippi,* due process cases have focused upon "the *crucial element of police overreaching*" . . . all have contained a substantial element of *coercive police conduct*. (Id., 163-164, emphasis added, footnote omitted.)

Connelly left no doubt that the purpose of due process was to protect against police overreaching in the interrogation setting and not simply an exclusionary rule limited to prohibiting admission at trial by concluding that:

> Moreover, suppressing respondent's statements would serve *absolutely no purpose in enforcing constitutional guarantees.* The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. See *United States v. Leon*, 468 U.S. 897, 906-913 (1984). (Id., 167, emphasis added.)

It is instructive to note that the cite to *United States v. Leon* was a reference to the Fourth Amendment and the holding that the constitutional violation occurs at the time of the search or seizure and that the exclusion of evidence at trial is a remedy. Because the intent of the holding was to "deter future violations of the constitution" and the violations that were the primary focus of the opinion were interrogation techniques

which occur in custodial interrogations and to prevent crucial elements of police overreaching. The inescapable conclusion is that the constitutional violation occurs at the time of the coercion and without regard to whether a prosecution is commenced or the statement is introduced.

To limit the due process clause to a trial right would defeat the principal of deterring "future violations of the constitution." So, if an innocent person such as the plaintiff in *Cooper v Dupnik* is intentionally harassed, badgered and subject to psychologically coercive interrogation and his *Miranda* rights are intentionally violated but he gives no statement, Chavez's argument logically means there is no remedy, no matter how egregious the police conduct. Limiting due process to a trial right would not "deter future violations of the constitution" and would undermine the basic protections Americans expect to have.

The passages quoted above in *Connelly* were cited with approval in *Duckworth v. Eagan,* 492 U.S. 195 (1989), where the Court reaffirmed it's holding that the coercion of a statement during interrogation, in contrast to a technical mistake in giving *Miranda* warnings prior to obtaining a voluntary inculpatory confession, violated the constitutional guarantees of the due process protected by the Fifth and Fourteenth Amendments. Justice O'Connor in a concurring opinion stated:

> The [Fifth] Amendment has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and

may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process. See *Colorado v. Connelly*, 479 U.S. 157, 163-164, and n. 1 (1986). *Id.*, 209.)

Justice O'Connor's citation of *Connelly* referenced the precise conduct that the due process clause aimed to protect: "certain interrogation techniques," preventing "coercive government misconduct;" "where police officers extracted confessions through torture;" "crucial element of police overreaching;" and the substantial element of "coercive police conduct." *Connelly, supra*, 479 U.S. at 163-164, fn.1 omitted. Justice O'Connor's description of the "criminal process," as opposed to limiting the constitutional violation to criminal "trial," leaves no doubt that this Court continues to maintain the traditional broad reach of the due process protections against coercive interrogations and that these constitutional violations occur when the coercion happens. [18]

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[18] See e.g., *Williams v. United States*, 342 U.S. 97 (1951) upholding conviction of a "special police officer" for a willful violation of due process rights by beating confessions from persons suspected of lumber theft. Id., 98. Because the suspects had not been prosecuted for the thefts, the confessions had never been admitted into evidence. See also the Courts of Appeal decisions upheld due process violations where the statements were never introduced into evidence *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994); *Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991); *Ware v. Reed*, 709 F.2d 345 (5th Cir. 1983); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001); *Cooper v. Dupnik*, 963 F.2d 1220

2. It is Clearly Established that Due Process Protects Against an Intentional Violation or Deliberate Indifference to the Right to Be Free from Coercive Interrogations

Since the time of this Court's early explanations of due process, it has stated that the core of the concept is to be protected against the arbitrary exercise of the powers of government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998), cites omitted.) The Court's opinions dealing with abusive executive action have repeatedly emphasized that the Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression.'" Id., 846, cites omitted. "'Substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . *or* interferes with rights 'implicit in the concept of ordered liberty.'" Id., 847, cites omitted, emphasis added. (See also *Miller v. Fenton*, supra, 109, and *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

3. Chavez's Indifference to Martinez's Condition Combined with His Intentional Violations of Clearly Established Constitutional Rights Violates Due Process

The undisputed evidence is that when Chavez arrived at the scene he knew that Martinez had been shot in the head, was paralyzed and screaming in pain and that he was under arrest, handcuffed in police

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(1992); *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir.1999) *en banc*.

custody. Chavez knew Martinez was the sole suspect accused of attempted murder on a police officer and that he (Chavez) was conducting a criminal investigation of that crime at the time he went into the ambulance.

From the time he entered the ambulance until he arrived at the hospital, Chavez had considerable time to fully appreciate and evaluate Martinez's incapacity to give a voluntary statement due to his extreme state of trauma, shock and disability as Martinez drifted in and out of consciousness. Notwithstanding this knowledge and although having adequate time to deliberate and to consult his superiors, Chavez deliberately ignored Martinez's extreme state of trauma, shock and disability and intentionally interrogated without giving any *Miranda* warnings, intentionally continued interrogating without attempting to obtain a knowing and intelligent waiver of *Miranda*. He deliberately ignored Martinez's assertion of his right to remain silent, repeatedly returned after being told by the medical staff to leave the emergency room as Martinez was being readied for surgery, and he intentionally used coercive interrogative techniques to overbear Martinez's will and coerced an involuntary statement.

Negligent conduct that inflicts harm will not violate substantive due process rights. *Davidson v. Cannon*, 474 U.S. 344, 348, (1986). However, *Lewis* made clear that:

> . . . behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise

> to the conscience-shocking level. 'Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.' Id., 849 emphasis in original).

The point of conscience-shocking can also be reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence.'" *Lewis*, 850. Deliberately indifferent conduct was held to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial. Id., cites omitted. This Court held that due process claims are evaluated by an appraisal of the totality of facts in a given case. *Id.*

In *Lewis*, the Court analyzed the markedly different circumstances of pretrial custody contrasted with high-speed law enforcement chases to demonstrate why the deliberate indifference that "shocks" where a person is in custody may not shock the conscious in a high speed chase.

The deliberate indifference fault standard is sensibly employed when actual deliberation is practical as in the custodial situation where forethought about an inmate's welfare *"is not only feasible but obligatory"* under situations where the prisoner is incapacitated so that he or she cannot exercise ordinary responsibility for his own welfare. Id, 851. "The combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and

make reasonable provision for the patient's welfare." *Lewis,* 852 fn. 12. The Court found that deliberate indifference where "such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Id., 853.

Here, Chavez had the luxury of having time to make an unhurried judgment, the chance for repeated reflection, and no *valid* competing obligations. From the time he saw Martinez laying in the grassy field with his hands handcuffed behind his back and screaming in pain, saw the seriousness of his wounds and his state of disability, he had ample time to do what his most basic training and constitutional obligations require, to wait until Martinez could give a free and voluntary statement after being advised of his constitutional rights protected by Miranda.

He had time to deliberate in the ambulance when he saw pain medication being administered. He had time to deliberate before he entered the emergency room, and during the 45 minute interrogation as Martinez lay screaming in pain, blinded and paralyzed, floating in and out of consciousness as more pain medication was being administered to prepare him for surgery. Instead, he acted with deliberate indifference to Martinez's condition and intentionally used coercive tactics to extract a confession.

There is no evidence in the record for Chavez's argument that his purpose was to obtain evidence of the shooting officer's misconduct. This was expressly repudiated by the District Court as a "sham declaration" which contradicted his earlier deposition testimony and

tape-recorded statements.[19] It is patently obvious that Chavez knew of Martinez's vulnerability and fear and he used it to overbear his will. There would have been no prosecution if Martinez had he died. The intentional act to interrogate at that time and while Martinez was even unable to remember his birthday (See Jt. App. 7) was a purposeful violation of due process with the intention to "worsen his legal plight."

Lewis made clear that where there is time to deliberate and the intent of the officer is to "harm suspects physically or *to worsen their legal plight,* then liability under the Fourteenth Amendment, is redressible by an action under § 1983." Id., 854, emphasis added. *Lewis* dramatically illustrates the distinction between the split second decisions that must be made in a high speed chase, necessitated by the speeding vehicle's failure to stop and the officer's duty to attempt to stop the motorcycle, from the situation in which Chavez found himself. Chavez was required to, and had plenty of time to use "forethought about an [arrestee's] welfare [because] it is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." Id., 851.

4. There Are Solid Policy Reasons Why the Narrow Reading of the Fifth and Fourteenth Amendments Should Be Rejected

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[19] A party cannot create an issue of fact by a declaration contradicting his own deposition or other sworn testimony. These "sham declarations" contradicting earlier harmful testimony creates no genuine issue of fact on a summary judgment motion. *Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 1597, 1603-1604 (1999) (reviewing "sham affidavit" holdings in every circuit.)

Michigan v. Tucker, 471 U.S. 433 (1974) also explained that the broad scope the Fifth Amendment privilege is necessary to protect the "evils" that will certainly flow from Chavez's argument: the government policy "that there is no Fifth of Fourteenth right to be free from coercive questioning" advanced by Chavez and the amici briefs:

> The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury. Testimony obtained in civil suits, or before administrative or legislative committees, could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding. (Id., 440-441, emphasis added.)

Precisely because exclusionary rules are limited to a trial, they alone cannot protect the invocation of these rights in all their applications cited above. Over 90% of criminal felony and misdemeanor cases are not tried and are resolved by plea bargain. Of those that do go to trial, the exclusionary is rule invoked only in a minuscule number of cases. [20] Therefore, exclusion at trial of

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[20] See Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, n. 6 (2002), analyzing data compiled from the Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 1998, at 432.

knowingly coerced statements cannot effectively protect the privilege and there will be no effective deterrent for purposeful coercive interrogations violating due process in all the other situations *Tucker* describes in which the self-incrimination privilege and due process is applicable.

42 U.S.C. § 1983 liability fills the gap and deters police misconduct. Within this forum, qualified immunity protects officers from reasonable mistakes, but not unreasonable conduct like that of Chavez who purposefully ignored Martinez's condition, chose not to give required *Miranda* warnings, used coercive tactics and ignored Respondent's invocations of his right to remain silent. Denial of qualified immunity for his unreasonable conduct will deter knowing violations of constitutional rights.

Presently, most officers respect their obligations and properly give warnings and 80% of suspects waive their *Miranda* rights.[21] However, unless there is the deterrence of § 1983 civil liability, an officer who deliberately ignores an invocation of *Miranda* rights or convinces a suspect, even by coercion, to waive *Miranda* has an incentive to obtain a "useful" but unconstitutional statement.[22] Thus, by affirming the district and appellate court's decisions this court will simply reaffirm

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[21] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996)

[22] An unconstitutional "useful" statement may be excluded from the prosecutor's case-in-chief, but it can be used to keep the defendant from testifying or subject him to cross examination or lead to "fruits" such as other witnesses or physical evidence of the crime.

that the constitutional guidelines affirmed in *Dickerson* and the rights of self-incrimination and due process are not to be deliberately ignored.

Dickerson made clear that the policy considerations extending constitutional self-incrimination rights of a person suspected of a crime are to set "concrete" constitutional limits in-custody interrogation, "and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, 439-440, cites omitted, emphasis in the original.[23] If the Fifth Amendment's privilege and due process is limited to an exclusionary rule at a criminal trial, then these policy considerations are defeated. Martinez urges this Court to reject this view.

5. Chavez's Misconduct Is a Violation of the Liberties That the Fifth and Fourteenth Amendments Are Intended to Prevent

Chavez's purposeful transgressions in the present case are precisely the type of conduct that was of concern to the Justices in *Miranda* and in *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Miranda* made clear that although it was concerned about the use of physical brutality in the pursuit of confessions, it focused primarily on psychological coercion. [24]

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[23] See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules: Safe Harbors and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030 (2001) discussing the necessity of "bright-line rules for law enforcement officials to follow." .

[24] "Since . . . [1940] this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Id., 448, quoting *Blackburn v. Alabama*, 361 U.S. 199 (1960)]

Martinez's statement was the product of aggressive purposeful psychologically coercive interrogation designed to take full advantage and oppress a helpless, blinded, paralyzed, heavily medicated person who simply wanted to be left alone and be treated. The cold words on the transcript of the interrogation do not fully convey the totality of the circumstances, Martinez's disability and pain. The actual tape recording is the best evidence of the circumstances Chavez witnessed.

The statements extracted by Chavez are not technically involuntary, or presumptively involuntary, as in *Oregon v. Elstad*, 470 U.S. 298 (1985), where the first statement made by the defendant was not involuntary or the result of deliberately improper tactics. Id., 305-307.[25] In contradistinction to Chavez, the police in *Elstad* did not use deliberately improper tactics during the interrogation that produced the first incriminating statement or the second. (Id., 316, 318.) Thus, there was no evidence of coercion or oppression in each of the cases in which this Court has allowed technical violations of *Miranda* such as in *Elstad* or *Quarles v. New York*, 467 U.S. 649 (1984). In *Quarles* the officer asked a suspect "where's the gun" in a crowded supermarket at

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[25] Although the police committed a *Miranda* violation by interrogating Elstad without first advising him of his rights, there was no evidence that they were aware that they should have administered a *Miranda* warning, because it was not clear the brief conversation in Elstad's living room was custodial, there was no restraint and the defendant's mother waited in the kitchen. Id., 305-307, 315.

the time of the detention. The suspect nodded his head. Nor was there coercion in *Harris v. New York,* 401 U.S. 222 (1971) where the defendant charged with selling heroin gave a voluntary statement after a faulty *Miranda* violation or *Oregon v. Hass,* 420 U.S. 714 (1975) where the defendant accused of stealing two bicycles was given *Miranda* admonitions and voluntarily confessed, but invoked his right to counsel and gave subsequent voluntary statement pointing out where he had hidden the bicycles.

Here, Martinez's statement was involuntary because it was actively compelled and coerced by law-enforcement officers during a custodial questioning of a criminal suspect, as those terms are used in *Spano v. New York, Haynes v. Washington, Mincey v. Arizona,* and *Miranda.*

Here, the decisions of the District Court and of the Ninth Circuit are consistent with the Fifth Amendment protections described in *Miranda, Dickerson, Michigan v. Tucker,* and the other cases in which the self-incrimination and due process rights were violated as discussed above.

Respondent does not suggest this case should establish a claim for relief where police officers have a conversation with a suspect in a benign way, without coercion or tactics that compel him to speak. [26]

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[26] See Susan R. Klein, Miranda *Deconstitutionalized When the Self Incrimination Clause and Civil Rights Act Collide,* 143 U. Penn. L. Rev. 417, 434-48 (1994), collecting and discussing cases holding an inadvertent *Miranda* violation is not actionable under § 1983.

Affirming the District Court's decision will continue to uphold and strengthen the traditional broad reach of the Fifth and Fourteenth Amendments described in *Michigan v. Tucker,* because it conforms to the expectations of the people of the United States. Americans, especially an innocent person falsely accused of a crime, rightly expect that if a police officer fails to "give them their rights" and refuses to stop interrogating after being asked to stop, coerces them and overbears their will until they say something – anything –to end their nightmare, that the liberty interests inherent in the Fifth Amendment will protect their human dignity and personal integrity not to be forced to speak against their will, whether or not they are charged with a crime.

The *Tucker* vision of the Fifth Amendment is consistent with the purposes of § 1983 litigation. "[S]ociety has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault. *Smith v. Wade,* 461 U.S. 30, 55 (1983). Chavez's conduct is a classic example of purposeful police misconduct that is "identical with the historical practices at which the right against self-incrimination was aimed." (*Michigan v. Tucker,* 444.)

C. Chavez Could Not Have Reasonably Believed That His Conduct Did Not Violate a Clearly Established Constitutional Right Because He Acted Unreasonably under the Circumstances

1. Chavez's Mistake of What the Law Required in the Situation He Faced Was Unreasonable

The relevant inquiry in determining the second question relevant to granting or denying qualified immunity is whether Chavez acted reasonable given the circumstances he confronted, assuming the facts to be taken in the light most favorably to Martinez. The concern of the immunity inquiry stated in *Saucier* "is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." Id., 205.

Saucier acknowledged that it is sometimes difficult for an officer to determine how the relevant legal doctrine [in that case an alleged split second decision to use a "gratuitously violent shove" allegedly received when he was placed into a van (Id., 208)] will apply to the factual situation the officer confronts. In concluding that there was no clearly established law preventing force in that situation, this Court's analysis noted that officer's right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. A reasonable officer in Saucier's position could have believed that a split second decision to hurrying the arrestee away from the scene (where the Vice President was speaking) due to the possible threat, was within the bounds of appropriate police response given the large crowd, the necessity to protect the Vice President and restoring order to the scene. Id., 208-209.

In contrast, coercion has no place in the law of voluntariness. Chavez had no reasonable belief that his overbearing coercive interrogation and intentional violation of *Miranda* admonitions were "within the bounds of appropriate police responses." In comparison to Saucier's situation where a reasonable officer in Saucier's position could have believed that hurrying Katz

away from the scene, and pushing him into a van was within the bounds of appropriate police responses, Chavez's deliberate indifference to Martinez's shockingly obvious state of physical and mental disability; his deliberate choice not to give *Miranda* warnings or obtain a knowing waiver of the admonition; his deliberate refusal to stop interrogation after invocation of the privilege is patently unreasonable. This Court should affirm the conclusion that he acted unreasonably.

2. Under The Law No Reasonable Officer Could Have Believed the Interrogation Was Lawful.

The District court properly found that no reasonable officer would believe that an interview of an individual "receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain constitutionally permissible." Pet.App. 29a. The facts presented prove Chavez knew Plaintiff was arrested, knew he was a suspect of attempting to shoot a police officer, and knew *Miranda* warnings were required and that a statement had to be voluntary. No reasonable officer could believe coercive tactics to extract incriminating false statements was lawful. No reasonable officer could believe that coercing a false involuntary "dying declaration" was lawful.

Michael Palmieri, Senior Officer, Oxnard Police Department and the chief investigator in the shooting of Martinez testified that the reasonable police officer at Oxnard would comply with the Fifth Amendment in the

situation confronting Chavez. [27]

D. Section 1983 Claims for Constitutional Violations of the Fifth and Fourteenth Amendments are Actionable

Chavez argues that the Fifth and Fourteenth Amendments should be excluded from those rights actionable under § 1983 because violations do not occur except, and only when, a statement taken in violation of the these amendments is introduced into evidence in a criminal "trial." That contention is contrary to the express language of the 42 U.S.C. §1983, which does not carve out an exception for any Amendment.

The Statute encompasses the entire "Constitution" – not selective portions thereof. 42 U.S.C. § 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster,* 407 U.S. 225, 239 (1972). The high purposes of this unique remedy make it appropriate to accord the statute "a sweep as broad as its language" because the § 1983 remedy is one that can "override certain kinds of state laws." *Monroe v. Pape,* 365 U.S. 167, 173 (1961). Since *Monroe* this Court has repeatedly enforced an expansive construction of § 1983, emphasizing the intention of the Congress of 1871 to create a broad federal remedy for violations of

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[27] C.A. 420, unopposed excerpt of the Deposition of Michael Palmieri, pp. 19:15 through 20:6, emphasis added.)

constitutional rights. [28] *Monroe* precisely focused on why § 1983 provided a remedy for a coerced confession in explaining the statute's higher purpose, the vindication and deterrence of constitutional violations:

> There will be many cases in which the relief provided by the state . . . will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Id., 198, Footnote 5.

Civil rights cases, as evidenced by the action at bench, seek to utilize the scope of § 1983 to prevent future violations by effectuating accountability for government actors, who would otherwise be excluded from the "check and balance" of justice. Respondent urges this Court to not adopt a theory that would be contrary to the purpose for which §1983 was enacted.

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[28] See e.g., *Wilson v. Garcia,* 471 U.S. 261 (1985), ("The rights enforceable under § 1983 include those guaranteed by the Federal Government in the Fourteenth Amendment: that every person within the United States is entitled to equal protection of the laws and to those 'fundamental principles of liberty and justice' that are contained in the Bill of Rights and 'lie at the base of all our civil and political institutions.'" Id., 278-279, footnotes omitted.)

CONCLUSION

The uncontroverted facts established, as a matter of law, that Chavez's interrogation violated Martinez's Fifth and Fourteenth Amendment rights and the involuntary and untrustworthy statements were knowingly and deliberately coerced from an incapacitated helpless person. As a matter of law Chavez did this to "to worsen [Martinez's] legal plight."

Martinez has shown that under *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Saucier v. Katz*, the District Court and the Ninth Circuit properly denied qualified immunity. Here, "The contours of the right are sufficiently clear that a reasonable official in Chavez's circumstance would understand that what he is doing violates that right." Martinez has shown that (1) The law governing the official's conduct was clearly established; (2) Under that law, no reasonable officer would have believed the conduct was lawful. The Ninth Circuit's and the District Court's denial of Chavez' motion for summary judgement and for qualified immunity should be affirmed.

Respectfully submitted,

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